

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE:

FERNANDO ALFONSO GARZA,

Debtor.

Case No. 23-50802-mmp

KEVIN EPSTEIN, UNITED STATES
TRUSTEE,

Plaintiff,

Adv. Proc. No. 23-05080-mmp

V.

NEW HORIZON ABODE LLC,
DANNITNESS MATTHEY,
DENNIS MORENO,
ESPI PROPERTIES, LLC, and
CRYSTAL BARRAGAN,

Defendants.

**NEW HORIZON DEFENDANTS' MOTION TO DISMISS DUPLICATE ADVERSARY
PROCEEDING PURSUANT TO THE OPENING OF MISCELLANEOUS
PROCEEDING AND TRANSFER OF COMPLAINT THERETO**

This pleading requests relief that may be adverse to your interests.

If no timely response is filed within 21 days from the date of service, the relief requested herein may be granted without a hearing being held.

A timely filed response is necessary for a hearing to be held.

Dennis Moreno (“Moreno”), Dannitess Matthey (“Matthey”), and New Horizon Abode LLC (“New Horizon,” and together with Moreno and Matthey, the “New Horizon Defendants”), by and through their undersigned counsel, hereby move to dismiss the above-captioned adversary proceeding for insufficiency of process under Rules 12(b)(4) and 12(b)(5) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7012 of the Federal Rule

of Bankruptcy Procedure (the “Bankruptcy Rules”). In support of the Motion, the New Horizon Defendants respectfully state as follows:

BACKGROUND

1. The above-captioned adversary proceeding (the “Adversary Proceeding”) was initiated by the U.S. Trustee filing his complaint [Adv. Proc. Dkt. No. 1] (the “Complaint”) on September 1, 2023. The Clerk of the Court issued summons that same day. [Adv. Proc. Dkt. No. 2]. The date for the New Horizon Defendants to respond to the Complaint under the summons in the Adversary Proceeding was October 2, 2023.

2. On September 7, 2023, the Court entered its Order Opening Miscellaneous Proceeding [Adv. Proc. Dkt. No. 3] (the “Miscellaneous Proceeding Order”). The Miscellaneous Proceeding Order directed the Clerk of the Court to (1) open a miscellaneous proceeding with the same parties as in the Adversary Proceeding, (2) transfer and enter on the miscellaneous proceeding docket the Complaint and the summon, and (3) close the Adversary Proceeding. The Clerk of the Court opened Misc. Proc. No. 23-00503 (the “Miscellaneous Proceeding”) that day, which included the Complaint and the respective summons. [Misc. Proc. Dkt. Nos. 2 & 3]. However, the Adversary Proceeding remains open.

3. The Clerk of the Court issues alias summons relating to the Miscellaneous Proceeding on September 7, 2023. [Misc. Proc. Dkt. No. 4]. The deadline for the New Horizon Defendants to respond to the Complaint under the alias summons issued in the Miscellaneous Proceeding is October 10, 2023.

4. On September 29, 2023, each of the New Horizon Defendants responded to the Complaint in the Miscellaneous Proceeding by filing motions to dismiss the claims against them

in the Miscellaneous Proceeding (the “12(b)(6) Motions”). [Misc. Proc. Dkt. Nos. 8, 9, and 10]. Copies of the 12(b)(6) Motions are attached hereto as Exhibits A, B, and C.

ARGUMENT

5. Rules 12(b)(4) and 12(b)(5) of the Federal Rules of Civil Procedure allow a defendant to challenge any departure from the procedure for serving the summons and complaint. *Richardson v. All. Tire & Rubber Co.*, 158 F.R.D. 475, 477 (D. Kan. 1994). Rule 12(b)(4) covers issues with the contents of the summons. Rule 12(b)(5) covers issues with the service of the summons. Additionally, section 105(a) of Title 11 of the United States Code (the “Bankruptcy Code”) provides that a bankruptcy court “may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the [Bankruptcy Code].”

6. While the New Horizon Defendants do not oppose proceeding on the Complaint through the Miscellaneous Proceeding as long as the procedural safeguards applicable to adversary proceedings apply—as the New Horizon Defendants contend is required¹—the issuance of alias summons in the Miscellaneous Proceeding is an irregularity that justifies dismissing the Adversary Proceeding. The relief sought should be pursued in a single proceeding. The Miscellaneous Proceeding Order indicates that the Court has directed that the proceeding should be the Miscellaneous Proceeding.

7. The New Horizon Defendants believe that this was the intention in the Miscellaneous Proceeding Order. To clarify the record and avoid uncertainty, however, they submit that the Court should enter an order dismissing the Adversary Proceeding. Absent such an order, that is less than certain.

¹ The relief sought in the Miscellaneous Proceeding constitutes an adversary proceeding. Adversary proceedings include proceedings (a) “to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee” and (b) “to obtain an injunction or other equitable relief.” Fed. R. Bankr. P. 7001. The relief sought is to recover money from the defendants and the imposition of an injunction.

WHEREFORE, the New Horizon Defendants request that the Court enter an order, substantially in the form of the proposed order attached hereto, dismissing the Adversary Proceeding and directing that all further proceedings continue in the Miscellaneous Proceeding only. In the alternative, the New Horizon Defendants respectfully request that the Court allow the New Horizon Defendants to file the 12(b)(6) Motions in the Adversary Proceeding.

Dated: September 29, 2023

SHANNON & LEE LLP

/s/ R. J. Shannon

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*Counsel to Dennis Moreno, Dannitess
Matthey, and New Horizon Abode LLC*

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2023, the forgoing document was served on the following parties (a) through the Court's CM/ECF System if registered to receive such service and (b) by separate email:

Erin Coughlin
Office of the U.S. Trustee
615 East Houston Street, STE 533
San Antonio, TX 78205
erin.coughlin@usdoj.gov

/s/ R. J. Shannon

R. J. Shannon